UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Stephan Gagne,

Plaintiff,

Hon. Hugh B. Scott

11CV361A

v.

Order and Report & Recommendation

C.O. Fix, et al.,

Defendants.

Before the Court are: the defendants' motion for partial judgment on the pleadings (Docket No. 13); the plaintiff's cross-motion for summary judgment (Docket No. 20); and the plaintiff's motion to compel. (Docket No. 21).

Background

The plaintiff commenced this action, asserting various claims against 33 defendants who are either employed at the Attica Correctional Facility ("Attica") or the administrative office of the New York Stated Department of Correctional Services ("DOCCS")[1] including: C.O. Fix

[1] The plaintiff identified this entity as the New York State Department of Correctional Services. (Docket No. 1 at page 3). This state agency is now referred to as the New York State Department of Corrections and Community Supervision ("DOCCS").

("Fix"); C.O.Pritchard ("Pritchard"); C.O. George ("George"); C.O. Radimaker, Sr. ("Rademaker, Sr."); C.O. Radimaker, Jr. ("Radimaker, Jr."); C.O. Bosworth ("Bosworth"); C.O. John Doe #1, C.O. John Doe #2; C.O. John Doe #3; Sergeant Corcoran ("Corcoran"); Sergeant Taborski ("Taborski"); Superintendent J. Conway ("Conway"); Dep. Security Chapius ("Chapius"); I.G.P. Supervisor Struebel ("Struebel"); Correction Counselor Whiteford ("Whiteford"); P.A. Graf ("Graf"); P.A. John Does; P.A. Jane Does; R.N.Turton ("Turton"); R.N. John Does; R.N. Jane Does; M.D. John Does; M.D. Jane Does; Commissioner Brian Fischer ("Fischer"); Deputy Commissioner LeClaire ("LeClaire"); Counsel William Gonzalez ("Gonzalez"); Galyn Schenk ("Schenk"); I.G.R. Roy ("Roy"); CORC Director Bellamy ("Bellamy"); CORC Director Egan ("Egan"); and the NYSDOCCS.[2]

The plaintiff claims that he is a qualified person with a disability who suffers from degenerative disc disease, peripheral arterial disease, and cardiac issues which have required triple by-bass surgery and stints inserted in his heart. In addition, Gagne asserts that he is a diabetic and that he suffers from sciatica and other back issues causing him to ambulate with a cane. (Docket No. 1 at page 5). The plaintiff asserts several wide-ranging claims, which District Court Judge Michael Telesca described as "unduly discursive" and "difficult to decipher." (Docket No. 4 at page 2). Several of the plaintiff's claims were dismissed by Judge Telesca upon initial review. The remaining claims appear to be as follows:

> Count 1 – On August 6, 2008, Fix confiscated the plaintiff's cane while the plaintiff was assigned to reside in B-Block. Fix considered canes to be weapons. Gagne made several complaints to

[2] The plaintiff also named Deputy Commissioner K. Decker and A.D.A Donna Masterson D'Aloia as defendants. These defendants were removed from the caption inasmuch as the complaint contained no allegations against them. (Docket No. 4 at page 25).

Corcoran about Fix confiscating his cane. Gagne asserts that after his cane was confiscated, he also wrote to Conway and Chapius. They failed to intercede. The plaintiff claims that he was forced to move to different cell blocks on August 30, 2008, April 24, 2009, May 1, 2009 and May 5, 2009. Gagne claims that each time he was forced to do so without his cane and that Corcoran made the plaintiff carry his "50 pound" property bags when moving to his new cells. Radimaker Sr. also refused to intervene. (Docket No. 1 ¶¶ 1-29).[3]

Count 2 – Gagne claims that Chapius refused to allow the plaintiff to bring his cane into the mess hall. As a result, Gagne claims that he was "deprived of food for weeks at a time" and that he "lost weight, became ill, developed diabetes and heart trouble." Gagne claims that he wrote to Conway, but that Conway did not respond to his complaint until after Gagne had transferred out of Attica. (Docket No. 1 at ¶ 30-38).

Count 3 – This count is partially redundant to Gagne's first claim. The plaintiff claims that on April 24, 2009, Bosworth filed a false misbehavior report against him, and as a result, he was required to move back to B-Block. Gagne claims that he possessed "personal information" relating to five "abusive" corrections officers and that Bosworth informed these five officers that Gagne possessed the personal information. As a result, the plaintiff claims he was threatened.[4] The plaintiff claims that he wrote to Chapius, Roy, Fischer, LeClaire, Gonzalaz and Schenk regarding this matter "to no avail." As a result of the behavior of Bosworth and Corcoran and John Doe. #1, the plaintiff claims he was removed from an art program which he needed for the parole board. He also claims that he was injured when he fell while moving between cells. (Docket No. 1 at ¶¶ 39-56).[5]

Count 4 – Gagne claims that on May 8, 2009, he was pulled out of

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[3] To the extent that the plaintiff asserted conspiracy claims or retaliation claims in Count 1, the claims were dismissed upon initial review of the complaint. (Docket No. 4 at page 26).

[4] The plaintiff does not identify any specific threat.

[5] To the extent that the plaintiff asserted conspiracy claims or retaliation claims in Count 3, the claims were dismissed upon initial review of the complaint. Also, all claims against John Doe #1 in Count 3 were dismissed.(Docket No. 4 at page 26).

the line heading to the mess hall and placed against the wall. Pritchard told him that he better "stop complaining about threats and make your family stop calling." The plaintiff asserts that Pritchard hit him with a night stick; that he was thrown to the ground by Radimaker, Jr.; he was kicked in the stomach by John Doe #2 and John Doe #3; and George stepped on his leg. On May 13, 2009, Gagne claims that Taborski told him to "sign into protective custody" because of his problems with the correctional officers. The plaintiff alleges that he met with Whiteford and "Mr. Roach,"[6] and that Whiteford threatened him and told him that the officers at Attica have a "free hand" and that he better sign into protective custody. (Docket No. 1 at ¶¶ 57-67).

Count 5 – The plaintiff asserts that from August 6, 2008 to September 22, 2008, he informed numerous R.N. John Does and R.N. Jane Does that his cane had been confiscated, and that no effort was made to re-issue the cane. On August 25, 2008, he claims he told P.A. Graf that his cane was confiscated and that he was in pain, but no treatment was issued. On September 4, 2008, he claims he met with John or Jane Doe R.N. who also failed to treat him for pain or re-issue his cane. On September 16, 2008 and November 10, 2008, Gagne alleges he met with John or Jane Doe R.N. and complained of injuries due to falling accidents, but that no treatment was provided. On September 22, 2008, Graf issued Gagne a cane, but did not examine the plaintiff or order any tests. Gagne claims that he complained about back pain to R.N. Turton on November 6, 2008, but that no treatment was provided. Due to the confiscation of his cane, the plaintiff claims that he was unable to ambulate to the mess hall; lost weight, became depressed, lost sleep and developed diabetes. (Docket No. 1 at ¶¶68-87).

Count 6 – In this count, the plaintiff asserts a claim of supervisory liability against Conway, Roy, Rischer, LeClaire, Gonzalez, Struebel, Egan and Bellamy. He claims that these administrators were aware of a pattern of retaliatory beatings and other assaults by the officers who assaulted him, but that they did nothing to intervene. (Docket No. 1 at ¶¶ 88-99).[7]

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[6] Mr. Roach is not named as a defendant in this action.

[7] The plaintiff's seventh claim was dismissed in its entirety. (Docket No. 4 at page 26).

Res Judicata

This is not the first law suit filed by the plaintiff dealing with claims arising from the denial of his use of a cane while incarcerated in a DOCCS correctional facility. See, for example, Gagne v. Ekpe, Civ. No. 02CV82 in which the plaintiff complained that he was denied the use of his cane while incarcerated at the Southport Correctional Facility in August of 2001. In addition, the plaintiff filed an action in the New York State Court of Claims alleging many of the same claims asserted in the instant case. In the Court of Claims case filed on October 22, 2008 ["Claim No. 115986"], Gagne claimed that on August 6, 2008, his cane was confiscated (Docket No. 13-1, Exhibit C at ¶ 8); on August 30, 2008, September 6, 2008, and October 8, 2008, he was forced to move to a new cell block and forced to carry his "50 pound" bags of property to his new cell (Docket No. 13-1, Exhibit C at ¶ 10); that he slipped and fell while trying to participate in outdoor exercise without his cane (Docket No. 13-1, Exhibit C at ¶ 11); that he fell on September 15, 2008 (Docket No. 13-1, Exhibit C at ¶ 12); that he saw medical personnel on September 16, 2008 and September 22, 2008, and complained of injuries due to his falls, but no treatment or tests were ordered (Docket No. 13-1, Exhibit C at ¶ 13); and that during this period he was forced to go to mess hall without his cane, causing him to miss meals (Docket No. 13-1, Exhibit C at ¶ 15). On January 27, 2010, Gagne filed an amendment to Claim No. 115986, asserting that various employees of Attica and the Wende Correctional Facility delayed or otherwise interfered with his medical treatment causing him to fall and injure himself (Docket No. 13-1, Exhibit D at ¶¶ 2, 12). The plaintiff again asserted that his cane was confiscated on August 6, 2008 (Docket No. 13-1, Exhibit D at ¶8); that he was forced to move to a different cell block on August 30, 2008, September 6, 2008 and October 8, 2008 and carry "50 pound"

property bags without the use of his cane (Docket No. 13-1, Exhibit D at ¶¶ 10, 14); that he fell because he attempted to participate in outdoor activities without his cane (Docket No. 13-1, Exhibit D at ¶11); that he was being denied use of his cane and therefore was being excluded from meals and participation in outdoor exercise (Docket No. 13-1, Exhibit D at ¶¶ 4, 15, 16); that his cane was taken away because it was considered a weapon (Docket No. 13-1, Exhibit D at ¶7); that on August 29, 2008, September 16, 2008 and September 22, 2008, he saw medical personnel complaining about repeated falls but no treatment or tests were performed (Docket No. 13-1, Exhibit D at ¶¶ 11, 13, 17).

On August 14, 2012, Gagne agreed to settle Claim No. 115986[8] for a payment of $3500.00. (Docket No. 13-1 at page 10). In conjunction with the settlement, Gagne executed a release in which he released and discharged the New York State Department of Corrections and Community Supervision, and the State of New York, its officers, agents ***and employees*** from all claims, demands and liability of every kind and nature, legal or equitable, occasioned by or arising out of the facts set forth in the foregoing claim." (Docket No. 13-1 at pages 16-17)(Emphasis added).

It is clear that the claims stated in Claim No. 115986 encompass the plaintiff's claims as asserted in Counts 1, 2, 5 and portions of the claims alleged in Count 3 in the complaint filed in this action. The defendants contend that these claims are barred by the doctrine of res judicata pursuant to the settlement agreement in that case. (Docket No. 13-1 at ¶ 12). "Under 28 U.S.C.§1738, 'Congress has specifically required all federal courts to give preclusive effect to

[8] The settlement also resolved two additional claims filed by the plaintiff: Claim No. 117754 and 121283. (Docket No. 13-1 at page 16).

state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" Barrington v. New York, 806 F.Supp.2d 730, 739 (S.D.N.Y.2011) (quoting Allen v. McCurry, 449 U.S. 90, 96, (1980)). Consequently, whether plaintiff's claims are precluded turns on an analysis of New York law. "New York employs a transactional approach to *res judicata* whereby once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Barrington, 806 F.Supp. at 739 (quoting Yoon v. Fordham Univ. Faculty and Admin. Retirement Plan, 263 F.3d 196, 200 (2d Cir.2001) (quotation marks omitted)). This applies unless the "initial forum lacked the power to grant the full measure of relief sought in the later litigation." Pack v. Artuz, 348 F.Supp.2d 63, 69 (S.D.N.Y.2004). Here, the plaintiff brought the instant claims against the individual defendants in both their official and individual capacities. (Docket No. 1 at pages 2-3). While "[t]he Court of Claims has jurisdiction over tort claims brought against the State and over damages claims brought against state employees in their official capacities," it does not have jurisdiction over claims brought against state officials in their individual capacities. Barrington, 806 F.Supp2d at 744-745. Thus, typically, a judgment from an action in the New York Court of Claims will be held to have a preclusive effect with respect to the claims asserted against individual defendants in their official capacity. Pizarro v. Gomprecht, 2013 WL 990998 (E.D.N.Y.,2013)(Because the Court of Claims did not have the jurisdiction to hear plaintiff's claims against defendants in their individual capacities, those claims are not precluded). In cases such as here, where a settlement agreement accompanies a dismissal, "the preclusive effect of the settlement is measured by the intent of the parties to the settlement." Berrios v. State University of New York at Stony Brook, 518 F.Supp.2d 409

(E.D.N.Y.,2007) citing Hanley v. Cafe des Artistes, Inc., 1999 WL 688426 at *6 (S.D.N.Y.,1999) quoting Greenberg v. Board of Governors, 968 F.2d 164, 168 (2d Cir.1992). This is so because a settlement resolving a Court of Claims action can also include claims that were not pending before the Court of Claims. In Berrios, the plaintiff brought a §1983 action against various defendants, in both their official and individual capacities, after having settled a Court of Claims lawsuit involving acts by the defendants alleged in the federal Court action. The Court held that the facts set forth in the Court of Claims action were identical to those set forth in support of the claims in the §1983 action. Citing to the language of the release executed in the Court of Claims matter, the Court in Berrios found that any claim arising from the same set of facts which the plaintiff may have filed prior to the date of the release was barred by the doctrine of *res judicata*. Berrios, 518 F.Supp.2d at 419-420.

In response to the instant motion,[9] much of the plaintiff's argument focuses on the fact that the Court of Claims lacks jurisdiction over the defendants in their individual capacity and could not grant punitive damages or declaratory or injunctive relief. (Docket No. 18 at pages 1-5).[10] However, as noted above, here the preclusive effect, for *res judicata* purposes, is measured

[9] Gagne also argues that the defendants' motion for judgment on the pleadings based upon *res judicata* is premature and should be made after discovery is provided. (Docket No. 20 at pages 1-2). The plaintiff does not identify any discovery issue relevant to the determination of the application of *res judicata* in this matter.

[10] The plaintiff also contends that he lacked a full and fair opportunity to litigate the Court of Claims action because his life was in danger while he was at Attica. (Docket No. 18 at pages 5-6). Such a claim is self-serving and belied by the fact that the plaintiff filed the instant action. Further, the plaintiff has never moved to rescind or otherwise challenge the settlement agreed to in the Court of Claims matter. The plaintiff has not demonstrated that he lacked a full and fair opportunity to litigate the Court of Claims matter which was resolved by the settlement and release at issue.

by the intent of the parties as agreed upon in the settlement and release resolving the Court of Claims action. The language of the release executed by the plaintiff in the related Court of Claims case is unambiguous. The release, which accompanied the settlement of the Court of Claims matter raising identical claims to those asserted by Gagne in this case, states that the plaintiff released and discharged "the New York State Department of Corrections and Community Supervision, and the State of New York, its officers, agents ***and employees*** from all claims, demands and liability of every kind and nature, legal or equitable, occasioned by or arising out of the facts set forth in the foregoing claim." (Docket No. 13-1 at pages 16-17)(Emphasis added). By its express language, the plaintiff's release extended to the employees of DOCCS.[11] Thus, the plaintiff is barred by the doctrine of *res judicata* from bringing the claims asserted in Counts 1, 2 and 5, and the portions of the claims in Count 3 that arise out of the same set of facts raised in the Court of Claims matter.[12] The defendants' motion for partial judgment on the pleadings should be granted consistent with the above.

Plaintiff's Motion for Summary Judgment

In response to the defendants' motion for judgment on the pleadings, the plaintiff filed a supplemental opposing declaration (Docket No. 20). This document also included a motion for

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[11] Because a claim against a state employee is deemed a claim against the state (Brown v. Wagner, 2014 WL 234821 (W.D.N.Y. 2014)("Claims against state employees in their official capacity are deemed claims against the state itself ... .") citing Kentucky v. Graham, 473 U.S. 159, 166 (1985)), language extending the release to state employees would not be necessary to discharge the plaintiff's claims against the defendants in their official capacity. Thus, the release must be read to apply to any such claims against state employees in their individual capacities.

[12] The defendants acknowledge that the claims in Count 3 relating to threats and witnessed assaults remain. (Docket No. 13-1 at page 7, n.3).

summary judgment as to the plaintiff's excessive force and supervisory liability claims. Such a motion is premature. The plaintiff recognizes as much stating that "upon the completion of discovery" he will be able to prove that the defendants were aware of officers who have conducted brutal assaults on inmates. (Docket No. 20 at page 8). The plaintiff further requested that summary judgment be granted "or held in abeyance until discovery is complete." (Docket No. 20 at page 10). Indeed, as discussed below, the plaintiff has filed a motion to compel discovery. In any event, the plaintiff's motion, which merely reasserts the allegations in the complaint, does not demonstrate that he is entitled to summary judgment as to his excessive force and supervisory liability claims. The motion should be denied without prejudice with leave for the plaintiff to re-file the motion after the completion of discovery.[13]

Motion to Compel Discovery

The plaintiff has filed a motion to compel the defendants to respond to various interrogatories he has served upon them. (Docket No. 21). The defendants assert that they advised the plaintiff that they would respond to the plaintiff's discovery demands after the Court resolved the defendants' motion for summary judgment. (Docket No. 23 at ¶ 7). Absent an agreement by the parties to defer discovery pending the resolution of the dispositive motion, the

[13] Upon initial review, the plaintiff's declaration appeared to be only a supplemental response to the defendants' motion, which had been mis-characterized as a cross-motion. No briefing schedule was set and the defendants have not responded to the motion. In the body of the document filed by the plaintiff, Gagne does specifically request summary judgment with respect to the excessive force and supervisory liability claims. The plaintiff has not been prejudiced by the failure of the defendants to respond inasmuch as the motion is premature. In light of the above, the plaintiff's letter request for a default judgment (Docket Nos. 24 and 25) should be denied.

defendants should have filed a motion for a protective order.

Notwithstanding, as discussed above, it is recommended that the defendants' motion for partial judgement on the pleadings be granted. Thus, the scope of discovery has been significantly reduced and some of the plaintiff's requests may no longer be relevant to the remaining claims in this action. The defendants are directed to respond to the plaintiff's discovery demands, including the assertion of objections to the respective requests, within 30 days of the date of this Order. If the parties cannot resolve any remaining disputes relating to the requested discovery, the parties may file an appropriate motion.

Conclusion

Based on the above, it is recommended that the defendants' motion for partial judgement on the pleadings be granted; and the plaintiff's motion for summary judgment be denied without prejudice. The plaintiff's motion to compel is granted in part and denied in part, consistent with the above.

Pursuant to 28 U.S.C. §636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten(10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, as well as W.D.N.Y. Local Rule 72(a)(3).

FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION

WITHIN THE SPECIFIED TIME, OR TO REQUEST AN EXTENSION OF TIME TO FILE OBJECTIONS, WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT ORDER BY THE DISTRICT COURT ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed2d 435 (1985); F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d. Cir. 1995); Wesolak v. Canadair Ltd., 838 F.2d 55 (2d Cir. 1988); see also 28 U.S.C. §636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, and W.D.N.Y. Local Rule 72(a)(3).

Please also note that the District Court, on *de novo* review, will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to W.D.N.Y. Local Rule 72.3(a)(3), "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3)may result in the District Court's refusal to consider the objection.**

So Ordered.

/s/ Hugh B. Scott
United States Magistrate Judge
Western District of New York

Buffalo, New York
February 11, 2014